UNITED NATIONS DISPUTE TRIBUNAL

Cases No.:	UNDT/GVA/2009/62 UNDT/GVA/2009/72 UNDT/GVA/2009/73 UNDT/GVA/2009/74 UNDT/GVA/2009/76 UNDT/GVA/2009/77 UNDT/GVA/2009/79 UNDT/GVA/2009/80 UNDT/GVA/2009/82
Judgment No.:	UNDT/2009/089
Date:	15 December 2009
Original:	English

Before: Judge Thomas Laker

Registry: Geneva

Registrar: Víctor Rodríguez

WILKINSON	APPLICANT 1
CORBAXHI	APPLICANT 2
FISTRIC	APPLICANT 3
GURRA	APPLICANT 4
JOLLDASHI	APPLICANT 5
KAKELI	APPLICANT 6
PETRONE	APPLICANT 7
REKA	APPLICANT 8
TAKACI	APPLICANT 9

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:
None

Counsel for Respondent:
Steven Dietrich, ALU/OHRM

Introduction

1. In an appeal filed on 26 June 2009 before the New York Joint Appeals Board (JAB) and transferred as of 1 July 2009 to the United Nations Dispute Tribunal (UNDT), the Applicants, all former staff members of the United Nations Mission in Kosovo (UNMIK), contest the Secretary-General's decision dated 23 February 2009 to terminate, with effect from 28 February 2009, their 300-series appointments of limited duration (hereinafter ALD) which were due to expire on 31 March 2009, without appropriate termination indemnity and without appropriate compensation in lieu of notice. More precisely, the Applicants do not contest the termination *per se* but the amount of termination benefits paid to them.

Facts

2. The nine Applicants entered the service of UNMIK between September 2000 and October 2004 as internationally recruited staff.

3. Throughout their assignment with UNMIK, the Applicants held a series of six-month ALDs under the 300 series of the former Staff Rules (hereinafter the Staff Rules), which were renewed without interruption. The last ALDs they were granted were due to expire on 31 March 2009.

4. On 23 February 2009, in the context of UNMIK downsizing, the Applicants and other staff members were notified of the decision to terminate their appointments with effect from 28 February 2009.

5. Between 25 and 27 February 2009, 15 staff members, including the Applicants, wrote a joint letter to the Secretary-General requesting review of the decision to terminate their appointments. These staff members also wrote to the Secretary of the New York JAB to request a suspension of action on the contested decision.

6. For the purpose of allowing the JAB to review the Applicants' request for suspension of action, the termination of their appointments was postponed until 5 March 2009, except for Applicants 3 and 6 whose names were apparently omitted

in the process and who were therefore separated on 28 February 2009, as decided initially.

7. On 3 March 2009, the JAB decided to make no recommendation in support of the Applicants' request for suspension of action and on the same day, the Applicants were informed of the Secretary-General's decision not to grant their request.

8. On 5 March 2009, the remaining seven Applicants were separated.

9. On 26 May 2009, 14 staff members, including the Applicants, filed a joint, incomplete statement of appeal to the New York JAB.

10. On 26 June 2009, 14 staff members, including the Applicants, filed, with the heading "class action", a joint, complete statement of appeal to the New York JAB.

11. Pursuant to the transitional measures set out in resolution 63/253 of the General Assembly, the above-mentioned JAB case was transferred to the UNDT on 1 July 2009 and by order dated 28 August 2009, the Tribunal ordered the transfer of the case from the New York Registry to the Geneva Registry.

12. On 25 September 2009, Applicant 1 sent to the Tribunal, on behalf of the above-mentioned 14 staff members, a motion for production of evidence in which she requested the Tribunal to order the Respondent to provide "all notes, documents, memoranda, records and any other material" in respect of a number of issues.

13. By order dated 09 October 2009, the Tribunal, considering among other things that article 2 of the statute of the UNDT only provides for individual applications, that all 14 individual cases did not raise the same issues and that the file transferred to the Tribunal did not contain all the information necessary for it to pass judgment on each individual case, ordered that the original JAB case be split into 14 separate cases. On the same day, the Applicants were instructed to submit additional information on their cases by 16 October 2009.

14. In early November 2009, on the basis of the information, or lack thereof, obtained by the Tribunal following the issuance of the above-mentioned order, five cases were dismissed by summary judgment, one of them because the appeal

to the JAB was time barred and the other four for abandonment of proceedings. There remained nine individual cases, which will be dealt with in the present judgment.

15. By order dated 16 November 2009, the Tribunal rejected the Applicants' motion for production of evidence. It did so considering that the Tribunal already had at its disposal all relevant information to address two of the main issues raised by the applications, i.e. (a) whether the Administration had a legal obligation to convert the Applicants' appointments from the 300 series to the 100 series of the Staff Rules and (b) whether the Applicants exhausted internal remedies with respect to the alleged violation of their rights arising from the non-conversion of their appointments.

16. On the same day, the Registry, acting on instructions from the Tribunal, requested the parties whether they wished an oral hearing to be held.

17. On 23 November 2009, Applicants 1, 5 and 9 submitted to the Tribunal a motion for oral hearing. In support of the motion, the three Applicants submitted, among other things, that:

a. "By continually stating to the Applicant that the Administration was making efforts to implement [his/her] conversion, the Administration deliberately and intentionally encouraged the Applicant to forgo other remedies."

b. The Administration gave "oral and written assurances" to the Applicants, including by letter dated 7 May 2008, that in case of early termination the Applicants "would receive a termination indemnity under Annex III of the Staff Regulations – in other words, a termination indemnity equivalent to that of 100 series staff". The Administration cannot now "claim that it is not bound to honor its commitment".

18. By letter dated 24 November 2009, the Registrar informed Applicants 1, 5 and 9 that the Judge examining their case considered that an oral hearing was not necessary for the resolution of their case but nevertheless agreed to hold one, which would take place on 10 December 2009. The Registrar further informed the

Applicants that the parties' physical presence at the hearing was not required by the Judge. Accordingly, and pursuant to article 9 of the Tribunal's statute and article 16 of the Tribunal's rules of procedure, they could appear at the hearing by electronic means and any costs incurred by the parties to attend in person would not be borne by the Organization.

19. By email dated 1 December 2009, Applicants 1, 5 and 9 withdrew their motion for oral hearing.

Parties' contentions

20. The Applicants' principal contentions are:

a. The Administration had a legal obligation to convert the Applicants' appointments from the 300 series to the 100 series of the Staff Rules after four years of service;

b. Accordingly, the Administration should have granted the Applicants the same termination benefits as those paid to staff employed under the 100 series of the Staff Rules, i.e. (i) termination indemnity calculated in accordance with paragraph (a) of annex III to the Staff Regulations, and (ii) one month's salary as compensation in lieu of termination notice in accordance with staff rule 109.3.

21. The Respondent's principal contentions are:

a. The contentions of Applicants 3, 7 and 9 challenging the Administration's non-conversion decisions are not receivable because they are time-barred;

b. The decision not to pay the Applicants 100 series termination benefits is not an administrative decision within the meaning of term as defined by the United Nations Administrative Tribunal (UNAT);

c. The decision not to pay the Applicants 100 series termination benefits was made in accordance with the provisions of the Applicants' letters of appointment and applicable staff rules;

d. The Applicants had no legal expectancy of conversion from the 300 series to the 100 series of the Staff Rules.

Relief sought

22. In their joint statement of appeal, the Applicants requested the JAB to award them:

a. "A termination indemnity […] in accordance with the scale set out in the Staff Regulations, Annex III, paragraph (a)";

b. "An indemnity equivalent to 30 days salary and allowances for the failure to give 30 days' written notice of termination of contract, as required by Staff Rule 109.3 paragraphs (b) and (c)";

c. One year gross salary as compensation for the "quantifiable and unquantifiable damages suffered" by the Applicants as a result of the Administration's failure to act in good faith and to comply with General Assembly resolutions, rules, regulations and procedures.

23. Additionally, in a subsequent submission to the UNDT, the Applicants requested the Tribunal to award them "payment of the repatriation grant in accordance with the schedule set out in the Staff Regulations, Annex IV".

Considerations

24. Since most of the facts and all important legal issues are the same in the nine cases before it, the Tribunal decided to examine their merits and dispose of them in a single judgment.

25. The first issue to be decided is whether, as claimed by the Applicants, the Administration had a legal obligation to convert their appointments from the 300 series to the 100 series of the Staff Rules after four years of service.

26. Preliminarily, it has to be noted that, in accordance with staff rule 304.4, "appointments under [the 300 series of the Staff] Rules carry *no expectancy … of conversion to any other type of appointment*" [emphasis added]. An identical provision was included in the Applicants' letters of appointment.

27. The *Scope and purpose of the 300 series of the Staff Rules* further stipulates that as far as ALDs are concerned: "Such appointments are intended for assignments not expected to exceed three years, with a possibility of extension, exceptionally, for a fourth and final year. Under no circumstances will an extension beyond four years be granted." A similar provision was included in the Applicants' letters of appointment.

28. Notwithstanding the foregoing, in a series of resolutions adopted between June 2004 and December 2008,[1] the General Assembly:

a. Decided, as of June 2004, to suspend the application of the four-year maximum limit for appointments of limited duration under the 300 series of the Staff Rules in peacekeeping operations; and,

b. As of January 2005, authorized the Secretary-General, bearing in mind the above-mentioned decision, to reappoint, under the 100 series of the Staff Rules, those mission staff whose service under 300-series contracts had reached the four-year limit, provided, among other things, that their functions had been reviewed and found necessary.

29. The Applicants' claim that the four-year limit for appointments under the 300 series of the Staff Rules, on the one hand, and the above-mentioned General Assembly resolutions, on the other hand, created a legal obligation for the Administration to convert their appointments to the 100 series is without legal basis.

30. First, the General Assembly, by suspending the application of the four-year maximum limit for 300 series ALDs effective June 2004, gave the Secretary-General the discretion to extend *under the 300 series* the appointment of mission staff after four years of service. The General Assembly's decision in this respect did not imply the possibility of conversion to another series of the Staff Rules.

31. Second, as regards conversions from the 300 series to the 100 series from January 2005 onwards, the use of the verb "authorize" by the General Assembly is unambiguous. It means that the Secretary-General had the discretion, *not the*

[1] A/RES/58/296, A/RES/59/266, A/RES/59/296, A/RES/60/266, A/RES/61/244, A/RES/61/276, A/RES/62/238, A/RES/63/250.

obligation, to convert from the 300 series to the 100 series the appointments of some of these mission staff, provided certain conditions were met.

32. In implementation of the above-mentioned General Assembly resolutions, the then Chief, Personnel Management and Support Services of the Department of Peacekeeping Operations (DPKO), informed all DPKO Chiefs of Administration, by memorandum dated 19 December 2006 and again in 2007, that in view of the General Assembly's decision to continue to suspend the four-year limit for ALDs under the 300 series:

> "[S]taff members *may be considered* for reappointment from 300 series to 100 series appointment provided the following criteria are met:
>
> a. The staff member must have reached … four years of service under an ALD appointment…
>
> b. The mission must certify that the functions performed by the staff member, as well as the staff member's services, will continue to be required at that mission for a minimum of six months … (Please note that, where a mission is downsizing and there is uncertainty whether the staff member's services will be required beyond 31 December 2007, the staff member would not meet the criteria.)" (Emphasis added)

Like the General Assembly's resolutions, the above-mentioned memorandum did not impose on the Administration any obligation to convert staff, or even an obligation to consider staff for conversion (the memorandum did not say that staff members "must" or "shall" be considered for reappointment), but gave the Administration the possibility to do so, provided certain conditions were met.

33. In light of the foregoing, it is clear that neither the General Assembly's resolutions, nor the 300 series of the Staff Rules, nor the Applicants' terms of appointment, nor the above-mentioned memorandum created a legal *obligation* for the Administration to convert the Applicants' appointments from the 300 series to the 100 series of the Staff Rules after four years of service.

34. The Applicants further avert that they were repeatedly given "assurances and promises" with regard to the conversion of their appointments. This could be of importance because the former UNAT consistently held in cases of non-

renewal that a legal expectancy of renewal could arise from "countervailing circumstances" such as an express promise on the part of the Administration (see UNAT Judgement No. 885, *Handelsman* (1998)). However, even if this principle could be applied *mutatis mutandis* to cases of conversion, in the supporting documents provided by the Applicants, the Tribunal found nothing, other than ongoing discussions, that could be deemed to amount to an express promise sufficient to create a legal expectancy of conversion. This is obvious with respect to annex 4 to the Applicants' statement of appeal, namely the minutes of a meeting between staff representatives and the Administration dated 15 February 2006, which merely indicate: "Conversion 300 > 100 series: Resumption of conversions is routinely requested by DOA 'from NY', *but appears to be stopped de facto*…" (emphasis added). As UNAT rightly found in *Handelsman* that opinions expressed by some representatives of the Administration cannot be understood as express promises, no express promise can either be identified in annex 6 to the Applicants' statement of appeal, namely the minutes of another meeting dated 26 September 2007 according to which "DOA/… explained that, *pending a decision of the General Assembly on this issue,* they would be reappointed under 100 series after December" (emphasis added). Moreover, this explanation refers to a precondition which obviously was not fulfilled

35. Furthermore, even if a promise had been made, this plea would not be receivable since the Applicants failed to exhaust internal remedies in a timely manner. At no time did they initiate formal proceedings against the decision not to convert their appointments to the 100 series or against the decision to grant them 300 series appointments, although they had the opportunity to do so when they reached the four-year limit – for one of the Applicants as early as September 2004, in the course of 2007 for four of them and finally in October 2008 for the last one - and each time their six-month contract was renewed – with the last renewal taking place in late 2008. Instead, the Applicants accepted and signed, without qualification, a series of appointments under the 300 series of the Staff Rules. They can therefore be taken to have acquiesced in the situation.

36. Applicants 1, 5 and 9 further claimed that they forwent other remedies precisely because the Administration "deliberately and intentionally encouraged" them to do so by making "specific assurances that it was diligently attempting to

ensure that" their appointments were converted. In support of this contention, Applicants 1, 5 and 9 quote exactly the same documents used in support of the previous contention. This plea can be dismissed for the same reasons as the previous one.

37. The second issue to be decided concerns the Applicants' claim that, instead of one week's salary as termination indemnity and two weeks' salary as compensation in lieu of termination notice, they should have been paid 100 series termination benefits, i.e. (a) a termination indemnity calculated in accordance with paragraph (a) of annex III to the Staff Regulations, and (b) one month's salary as compensation in lieu of termination notice in accordance with staff rule 109.3.

38. In this respect, the Respondent argued that the decision not to pay the Applicants 100 series termination benefits is not an administrative decision as defined by UNAT and therefore is not subject to appeal. In fact, the Applicants contest the decision that was communicated to each of them by letter dated 23 February 2009 regarding the termination of their appointments. There is no doubt that such decision is a unilateral and individual decision taken by the Administration, which produced direct legal consequences, one of them being the amount of termination benefits payable to the Applicants. This decision, and by way of consequence its legal implications, is therefore subject to appeal.

39. Returning to the Applicants' claim that they should have been paid 100 series termination benefits, the Tribunal finds that since the Applicants held valid 300 series appointments, they cannot claim benefits, including termination benefits, other than those to which they were entitled under the 300 series of the Staff Rules. In this respect, the Administration complied with staff rule 309.3, *Notice of termination*,[2] and staff rule 309.4, *Termination indemnity*,[3] and with the

[2] Staff rule 309.3 provides that: "(a) Staff appointed under these Rules whose contracts are to be terminated prior to the specified expiration date shall be given not less than one week's written notice in the case of locally recruited staff members and two weeks' written notice in the case of non-locally recruited staff members, or as otherwise provided in the letter of appointment. (b) In lieu of the notice period, the Secretary-General may authorize compensation equivalent to salary and applicable allowances corresponding to the relevant notice period, at the rate in effect on the last day of service."

[3] Staff rule 309.4 provides that: "In accordance with paragraph (e) of annex III to the Staff Regulations, staff members appointed under these Rules shall not be paid a termination indemnity unless such payment is specified in the letter of appointment."

Applicants' letters of appointment[4] when it decided to pay them one week's salary as termination indemnity and two weeks' salary as compensation in lieu of termination notice.

40. Applicants 1, 2, 5 and 9 pointed out that the Administration made a written commitment to them, following an agreement with UNMIK Field Staff Union, that, should their appointments be terminated prior to expiration, they would be entitled to termination indemnities in accordance with annex III to the Staff Regulations. The Applicants err, however, when they interpret this to mean that they would receive "a termination indemnity equivalent to that of 100 series staff".

41. The above-mentioned annex III, *Termination indemnity*, is an annex to the Staff Regulations, not to a particular series of the Staff Rules. Its paragraph (e) actually applies to 300 series staff, like the Applicants, and stipulates that:

> "Staff members specifically engaged … for service with a mission … may be paid termination indemnity if and as provided *in their letters of appointment*." (Emphasis added)

42. Accordingly, in paying the Applicants a termination indemnity equivalent to one week's salary as provided for in their letter of appointment (see footnotes 3 and 4), the Administration applied the provisions of annex III and complied with its legal obligations.

43. It is also clear, in light of the foregoing considerations, that the Applicants, who held valid 300 series appointments, cannot claim the payment of a repatriation grant, an entitlement that does not exist under the 300 series of the Staff Rules.

[4] The Applicants' letters of appointment provide that: "This appointment may be terminated at any time, in accordance with staff rule 309.2 (b), if, in the Secretary-General's opinion, such action would be in the interest of the United Nations. Should your appointment be terminated prior to the specified termination date, you will be given notice in writing of no less than two weeks, or as otherwise provided in your letter of appointment, in accordance with staff rule 309.3 (a). In lieu of the notice period, the Secretary-General may authorize compensation calculated on the basis of the salary which you would have received had the date of termination been at the end of the notice period. If your appointment expires on the expiration date, no termination indemnity is payable. If it is terminated prior to the expiration date, a termination indemnity equivalent to one week of net salary for each month of uncompleted service will be paid …"

Conclusion

44. In view of the foregoing, the Tribunal DECIDES:

The applications are rejected in their entirety.

(*Signed*)

Judge Thomas Laker

Dated this 15th day of December 2009

Entered in the Register on this 15th day of December 2009

(*Signed*)

Víctor Rodríguez, Registrar, UNDT, Geneva